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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1421

DESIGN AND MANUFACTURING CORPORATION,
Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and its LOCAL 2042, et al.,
Respondents.

BRIEF OF THE INDIANA LEGAL FOUNDATION, INC. AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

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INTEREST OF THE AMICUS CURIAE.

This brief is filed pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States. Both counsel for petitioner and counsel for respondent have stated that the respective parties consent to the filing of this brief.

The Indiana Legal Foundation, Inc. ("Foundation") is a corporation organized under the Indiana not-for-profit corporation act by a group of concerned Indiana citizens. Its purpose is to provide responsible representation in litigation and administrative proceedings involving broad and significant constitutional and legal questions. The Foundation's membership includes in

excess of one hundred (100) corporations that do business in Indiana. Funds for the operating budget of the Foundation are provided through grants from private sources and through support from Indiana businesses, trade and professional associations and individuals. Contributions to the Foundation are deductible for federal income tax purposes.

The Foundation believes that the instant case presents a legal issue of significance to the public because it involves a generally applicable aspect of national labor policy, that is, whether or not collective bargaining agreements are subject to effective enforcement. Petitioner (Appellee in the Court of Appeals) and Respondent are expected to direct their arguments principally to the question of whether or not the instant case is distinguishable on its facts from *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U. S. 397 (1976), and is instead subject to the rule of *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970). The Foundation acknowledges that this question is in the instant case and agrees with Petitioner's position that the instant case is distinguishable from *Buffalo Forge, supra*. The Foundation also believes that the facts of the instant case logically suggest a reconsideration of *Buffalo Forge*. This brief is directed toward such reconsideration. If the Court does reconsider *Buffalo Forge*, and decides to overrule that decision, such a holding would dispose of the instant case.

THE FACTS.

The Collective Bargaining Agreement.

The relevant portions of the collective bargaining agreement must be briefly characterized:

SECTION 4.0

GRIEVANCE PROCEDURE

Section 4.1—Definition of A Grievance.

> *A grievance is defined to mean any question or controversy between the Company and the Union, or between the Company and any employee or employees covered by this Agreement, concerning:*
>
> (1) Any matter relating to rates of pay, hours of work or other conditions of employment which are not covered by this Agreement, or
>
> (2) *Any disagreement arising out of the application, interpretation or enforcement of the provisions of this Agreement.*

Section 4.2—Grievance Procedure.

> *. . . All grievances shall be processed in accordance with the procedure set forth in this section.* (emphasis added)

It appears therefore that the Employer and the Union broadly defined a grievance and included "Any disagreement arising out of the application, interpretation or enforcement of the provisions of the Agreement." And the parties agreed that "All grievances shall be processed" pursuant to the grievance procedure.

Section 4.2 proceeds with a four-step procedure, the last step of which begins as follows:

> Step 4. In the event that a grievance involving the application, interpretation or enforcement of the provi-

> sions of this Agreement shall not have been satisfactorily adjusted during the three steps of the Grievance Procedure outlined above, the Union may submit the grievance to arbitration by giving notice, within twenty (20) calendar days following receipt of the Company's answer in Step 3, of its desire to arbitrate.

Step 4 proceeds to provide for the selection of the arbitrator, a description of his authority, the payment of his fees and that his "decision shall be final and binding on all parties to this Agreement." In Section 4.4, it is provided that unless a grievance is filed and advanced by the Union within the contractually specified time limits, it is deemed conclusively settled on the basis of the Company's last decision.

In view of the foregoing, the contract on its face contemplates a mandatory grievance and arbitration procedure as the only contractual enforcement procedure. The contract on its face also contemplates the binding effect of an arbitration decision. These characteristics of the contract are true with respect to "any disagreement arising out of the application, interpretation or enforcement of the provisions of the Agreement."

The no-strike clause was the source of the contracting parties' disagreement about application, interpretation, and enforcement. That clause, the traditional counterpart of an agreement to arbitrate, confirms the mandatory, inclusive and binding arbitration contract of the parties. It also contained an unusual agreement about sympathy strikes:[1]

SECTION 10.0

STRIKES AND LOCKOUTS

> *Section 10.1.* The Union agrees that it will not engage in, initiate, authorize, sanction or support any strike, slowdown, stoppage of work or other interference with production or the quality of the product during the life of this Agreement. The Company agrees that there shall be no lockouts during the life of this Agreement.
> *Section 10.2.* In the event of a strike by the Union at either of the Company's plants in Connersville, Indiana, the Union will not strike or picket in any manner the Richmond plant, nor will employees in the Richmond unit support the strike in Connersville by any picketing, strike or work stoppage of any kind. However, this limitation shall not apply in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

1. It appears in the record that a correlative provision existed in the parties' Connersville collective bargaining agreement.

Thus, the parties expressly contracted about sympathy strikes at Richmond arising out of a strike at Connersville. On the one hand, they contracted generally to prohibit such strikes; on the other, they contracted to permit such strikes:

> in the event that the Company brings any production from either of the Connersville plants to Richmond which would necessitate hiring new employees at the Richmond plant during a lawful strike at either of the Connersville plants.

It is undisputed that the parties had a "disagreement arising out of the application, interpretation or enforcement" of their contract and that the disagreement was specifically concerned with the fact question of whether or not the Employer had taken these acts which permitted the Union to strike at Richmond. The record establishes that the Union contended that such acts had been taken. The Employer denied that such acts had been taken, and offered to submit that question to expedited arbitration. The Union spokesman responsible for the picketing that caused the strike testified that if such acts had not been taken the picketing would be terminated.

THE ISSUE.

Is there equity jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947[2] to enjoin a strike pending arbitration of an arbitrable question as to whether an employer has taken those acts which, pursuant to the collective bargaining agreement, permit a sympathy strike?

2. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U. S. C. § 185(a) (1970).

ARGUMENT.

Consideration of the instant case requires an analysis of the three decisions that surround the instant case: *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (1970); *Gateway Coal Co.* v. *United Mine Workers,* 414 U. S. 368 (1974); and *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U. S. 397 (1976). To the practitioner, such an analysis suggests something curious about the state of law with which these cases are concerned.

An analysis of the three cases begins with an identification of what they have in common, with a consideration of the common philosophy of the three decisions. This philosophy appears in connection with four *reasons* that the cases offer: the existence of a national labor policy in favor of arbitration of contract disputes; the status of the Norris-LaGuardia Act's[3] jurisdictional limitations; the fact that the equity remedy is the meaningful remedy in enforcement of arbitration and no-strike agreements; and the fact that the absence of equitable enforcement deprives the employer of its bargain.

National Labor Policy.

All three decisions reiterate a national labor policy in favor of arbitration as the method for resolving disputes between employers and unions. In *Boys Markets,* this discussion occurs especially at page 252 of the decision. The national policy is attributed to the Congress. A commentator's statement that refers back to *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957) is approvingly quoted: "(*Lincoln Mills*) went a long way towards making arbitration the central institution in the administration of collective bargaining contracts."[4] *Gateway*

3. 47 Stat. 70, 29 U. S. C. § 101 *et seq.*

4. 398 U. S. at 252.

Coal contains a consistent statement of the compelling nature of this national policy at pages 377-379. Section 203(d) of the Labor Management Relations Act of 1947 is quoted as a statement of the policy.[5] To the Steelworkers Trilogy is attributed "the now well-known presumption of arbitrability for labor disputes. . . ."[6] And *Buffalo Forge* is no less categorical. That decision approvingly characterizes *Boys Markets* with respect to this "strong congressional preference for the private dispute settlement mechanisms agreed upon by parties."[7] The decision reflects this policy in extensive dicta concerning the *Buffalo Forge* sympathy strike:

> [E]ach of the contracts between the parties also has an arbitration clause broad enough to reach not only disputes between the Union and the employer about other provisions in the contracts but also as to the meaning and application of the no-strike clause itself. Whether the sympathy strike the Union called violated the no-strike clause, and the appropriate remedies if it did, are subject to the agreed-upon dispute-settlement procedures of the contracts and are ultimately issues for the arbitrator. (citations omitted) The employer thus was entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate if the Union refused to do so. (citation omitted) Furthermore, were the issue arbitrated and the strike found illegal, the relevant federal statutes as construed in our cases would permit an injunction to enforce the arbitral decision. (citation omitted)

428 U. S. at 405.

Role of Norris-LaGuardia.

The decisions are also consistent in their conceptual view of the Norris-LaGuardia Act. According to *Boys Markets*, that statute must be considered in the context of the abuses it was

5. 414 U. S. at 377.
6. *Id.*
7. 428 U. S. at 407.

designed to correct and in the light of the National Labor Relations Act,[8] the Labor Management Relations Act and other subsequent legislation. Norris-LaGuardia is therefore not a statement of absolutes. It must be accommodated and reconciled with legislative and judicial experience and what has happened to labor organizations and industrial relations. This accommodation and reconciliation is a "task of the courts."[9] *Gateway Coal* approvingly and extensively cites and characterizes *Boys Markets* on this point.[10] *Buffalo Forge* is not as express on the role of Norris-LaGuardia as the other two decisions, but it is implicitly consistent. Like the prior cases, *Buffalo Forge* is itself an inquiry into the appropriate role of Norris-LaGuardia as a matter of judicial policy.

Significance of the Equitable Remedy.

On the meaningfulness of the equitable remedy, *Boys Markets* has this to say:

> [A]ny incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

398 U. S. at 248.

Gateway Coal also concerned itself with the significance of the injunction as the remedy. Quoting *Boys Markets*, *Gateway Coal* spoke of the devastating implications for the enforcement of

8. 61 Stat. 149, 29 U. S. C. § 151 *et seq.*
9. 398 U. S. at 251.
10. 414 U. S. at 380-85.

arbitration agreements if equitable relief is unavailable.[11] *Buffalo Forge* is again not so express, but the above-quoted dicta regarding the circumstances in which an injunction is available seem to suggest that decision's acceptance of the principle that equitable relief is the effective relief.

Protection of the Bargain.

Finally, the three decisions conform on the proposition that in a collective bargaining agreement the *quid-pro-quo* is the union's commitment not to strike for the employer's agreement to arbitrate. In *Boys Markets* the Court suggested that the employer's incentive is dissipated if it does not have an effective remedy for breach of the no-strike clause. It is deprived of its bargain.[12] *Gateway Coal* quotes this analysis from *Boys Markets.*[13] Accordingly, *Gateway Coal* implied a no-strike clause because of the presence of the agreement to arbitrate. And *Buffalo Forge* conforms to the prior decisions in this respect.[14] It discusses the *"quid-pro-quo"* factor and the employer's deprivation of its bargain and does not suggest that these are not genuine considerations. It is of course presumably self-evident that, from an employer's standpoint, the no-strike clause is what a collective bargaining agreement is all about. An employer agrees to wages and terms and conditions of employment to induce the union not to strike. Except for the no-strike clause, every provision of a collective bargaining agreement is a limitation of some sort on an employer's freedom of action in operating its business. It agrees to these limitations in order to obtain the no-strike clause.

In view of the foregoing, it appears that the Court deems that there is a national labor policy favoring arbitration rather than self-help; that the role of Norris-LaGuardia in regard to juris-

11. *Id.* at 382.
12. 398 U. S. at 248-49.
13. 414 U. S. at 382.
14. 428 U. S. at 407.

diction is to be judicially determined; that injunctive relief is the only genuine relief when a no-strike clause is violated; and that such a violation if unremedied destroys the bargain. *Buffalo Forge* itself embraces these concepts, but comes to a very different conclusion than the other cases. It is appropriate to consider the source of this different result in light of the otherwise common principles of the three cases.

Analysis of Buffalo Forge.

It is conceded that there is a factual difference between *Buffalo Forge* and its predecessor cases. Thus, the *Buffalo Forge* strike was a sympathy strike and was not a strike *over* a dispute as to the meaning of any provision of the contract other than the no-strike clause itself.[15] If it is the Court's intent to withdraw from the thrust and policy of *Boys Markets* and *Gateway Coal,* the sympathy strike fact can be used as a ground for such withdrawal. But, as has been said, the decision in *Buffalo Forge* does not on its face counsel a change in national policy. Indeed it restates that policy. Thus, to paraphrase the above-quoted dicta in *Buffalo Forge:*

1. There was an unrestricted no-strike clause.
2. There was an arbitration clause broad enough to reach issues as to the meaning of the no-strike clause itself.
3. Whether the sympathy strike violated the no-strike clause, and the appropriate remedies if it did, were subject to the arbitration provisions of the contract and were ultimately issues for the arbitrator.

And there was plenty of equity jurisdiction available in *Buffalo Forge:*

1. The employer was entitled to invoke the arbitration process to determine the legality of the sympathy strike

15. As pointed out in the dissenting opinion in *Buffalo Forge, Gateway Coal* establishes that the presence of such a strike "over" is not jurisdictionally essential, which conclusion is also expressly stated in the above-quoted extensive dicta from the decision in *Buffalo Forge.* 428 U. S. 413, n. 2.

and to obtain an injunction requiring the Union to arbitrate; and

2. In the event that the arbitrator found the sympathy strike illegal, the employer was entitled to an injunction to enforce the arbitrator's decision.

But, according to the decision, what the employer was not entitled to was an injunction against the strike pending the arbitrator's decision as to whether the strike was permissible under the no-strike clause. Thus, there is a gap surrounding the arbitration process.

The Foundation contends that this gap cannot be reconciled with the national policy that *Buffalo Forge* itself reiterates. This is so because if the parties' agreement against strikes and in behalf of arbitration is not protected pending the arbitration process, there will be no arbitration at all. Instead, with its plant shut down and without an effective remedy against the shutdown, the employer must accommodate itself to the self-help. The equity jurisdiction that *Buffalo Forge* offers becomes academic. The employer must resolve the strike on self-help terms, and the dispute does not reach the judicial enforcement point. Thus, in the course of the self-help, the national labor policy becomes meaningless. The parties' bargain is destroyed. This is the heart of the problem with *Buffalo Forge*. As a practical matter, it constitutes a significant contradiction of its own premises, premises that it shares with *Boys Markets* and *Gateway Coal*. *Buffalo Forge* represents an anomaly in the development of the national labor policy.

Buffalo Forge reaches its conclusion on several bases. It argues that the strike in that case "had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain."[16] The Foundation does not see how this can be, given the fact that there was an absolute no-strike clause and an inclusive agreement to arbitrate that reached the meaning of the no-strike clause, and given the

16. 428 U. S. at 408.

further fact that the employer had surely entered into the agreement in consideration of a protection against strikes during the agreement's term. *Buffalo Forge* also relies on an application of Norris-LaGuardia. But surely it is apparent that Norris-LaGuardia, as such, begs the question. *Buffalo Forge* and its predecessors pose the issue of accommodation of Norris-LaGuardia to national labor policy in view of the context of abuses against which it was directed when enacted and in view of the legislation since it was enacted. The Foundation contends that Norris-LaGuardia was not concerned with the *Buffalo Forge* facts: an unrestricted no strike clause; an arbitration clause that reached the issue of the meaning of the no-strike clause; and the arbitrability of whether the strike violated the no-strike clause. Finally, *Buffalo Forge* suggests that an injunction in that case would have drawn the courts into "any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions . . . and make the courts potential participants in a wide range of arbitrable disputes . . . not just for the purpose of enforcing promises to arbitrate . . . but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act."[17] The Foundation submits that this was not an inevitable or even likely consequence of an injunction in *Buffalo Forge*. This is so because *Buffalo Forge*, like any other decision, has meaning in the light of its facts. The facts of *Buffalo Forge* simply did not involve a range of alleged breaches of contract. On the contrary, as the decision itself states, *Buffalo Forge* was concerned with a strike, an unrestricted no-strike clause, an arbitration clause broad enough to reach the issue of the meaning of the no-strike clause itself, and an arbitrable issue of whether the strike violated the no-strike clause. It would seem that there would have been no difficulty in *Buffalo Forge*, and there would

17. *Id.* at 410-11.

be no difficulty in the instant case, in confining the precedent implications of the decision to the *Boys Markets* and *Gateway Coal* consideration of enforcing a no-strike and arbitration agreement.

CONCLUSION.

In *Buffalo Forge*, the parties contracted to prohibit all strikes and to arbitrate even the issue of the meaning of the no-strike clause and the legality of the *Buffalo Forge* sympathy strike. In the instant case, the Employer and the Union did these same things, and they made an express attempt to isolate a strike at Connersville from operations at Richmond. As related to the purposes of Norris-LaGuardia and the evils against which that statute was directed, it is gratuitous to conclude that this attempt to isolate was more advantageous to the Employer than to the Union. Strikes and the spreading of strikes are not necessarily to the benefit of a union or its members. A union may have as much at stake in agreeing to isolate a strike as the employer does.[18] Thus, the parties—both parties—to the instant contract agreed to such isolation unless the Employer took certain acts. The two parties then disagreed as to whether such acts had been taken by the Employer, and because of its view of the facts the Union struck.

In the above circumstances, the Court's initial description of the issue it was re-examining in *Boys Markets* applies directly to the instant case:

> (Whether) the Norris-LaGuardia Act preclude(s) a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, even though that agreement contains provisions,

18. Indeed, in the instant case, the Union contended in the District Court that Section 10.2 of the collective bargaining agreement was inserted for the purpose of benefiting the Union. *See* the opinion of the district court, Petitioner's Appendix, p. A22.

> enforceable under Section 301(a) . . . for binding arbitration of the grievance dispute *concerning which the strike was called*. (emphasis added)

398 U. S. 237-38.

In *Boys Markets*, the Court answered this question in the negative.

On the assumption that *Buffalo Forge* is applicable to the instant case, it is requested that it be reconsidered. It is believed that such reconsideration will lead the Court to the same conclusion that was reached when *Boys Markets* was the vehicle for the reconsideration of *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962). It will be seen that *Buffalo Forge:*

> casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations—arbitration agreements with their attendant no-strike obligations . . . (and) . . . does not make a viable contribution to federal labor policy.

398 U. S. at 249.

Respectfully submitted,

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